THAVANATHAN BALASUBRAMANIAM

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CRIMINAL REFERENCE NO: 06-1-1994]
21 MARCH 1997

CRIMINAL LAW: *Corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Whether conviction proper - Whether supported by evidence - Whether defence case adequately considered - Prevention of Corruption Act 1961 ss. 3(1)(a), 4(a)*

CRIMINAL PROCEDURE: *Reference to Federal Court - Section 66 (repealed) Courts of Judicature Act 1964 - Hearing of - Evidence adduced in Courts below - Whether open to review by Federal Court*

CRIMINAL PROCEDURE: *Sentence - Corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Composite sentence of imprisonment and fine - Accused had not profited from wrong doing - Whether additional sentence of fine unwarranted*

EVIDENCE: *Admissibility - Of evidence in earlier trial - Whether could be admitted in subsequent trial where such evidence are relevant to facts in issue - Evidence Act 1950 ss. 5, 6, 7, 8, 9*

EVIDENCE: *Admissibility - Charge of corruptly soliciting and accepting gratification - Accused acquitted of soliciting charge but convicted on accepting charge - Evidence adduced in respect of soliciting charge - Whether admissible to prove charge of accepting - Whether evidence so connected as to form part of the same transaction - Evidence Act 1950 ss. 5, 6, 7, 8, 9 - Prevention of Corruption Act 1961 ss. 3(a)(i), 4(a)*

The applicant, formerly a Magistrate attached to one of the Magistrate's Courts in Kuala Lumpur, was charged in the Sessions Court with two offences under ss. 3(a)(i) and 4(a) respectively of the Prevention of Corruption Act 1961 ('the Act'), for corruptly soliciting and accepting for himself a sum of RM15,000 as an inducement to acquit and discharge one Wong Sow Ying ('PW2') of a certain offence. The gratification was allegedly solicited and accepted by the applicant from PW4 through one Por Choo Aik ('PW3').

The facts showed that PW2 was charged before the applicant for an offence under s. 4A(a) of the Common Gaming Houses Act, 1953. Apparently, the applicant informed PW4, an interpreter of the Court, that PW2 could be discharged if there was an offer of RM15,000. A meeting then took place between the applicant, PW3 and PW4 at the Grand Pacific Hotel, Kuala Lumpur. Evidence *inter alia* showed that at the meeting, the applicant was smiling and nodding his head when PW3 and PW4 were discussing in Hokkien about the settlement of the gaming case. PW3 later reported the matter to the Anti Corruption Agency ('ACA') whereupon PW4 was apprehended by the ACA. PW4 agreed to co-operate with the ACA and undertook to see the applicant in his chambers to hand over to him RM15,000 of marked currency notes. This PW4 did, and the applicant was consequently arrested and charged as above. Testimonies given by the ACA officers ('PW5 and PW6') showed that in the chambers, the applicant was seen holding and dropping the money on the floor.

The learned Sessions Judge acquitted the applicant of both charges without calling for the defence, ruling that no *prima facie* case had been made out against the applicant. On appeal, the High Court affirmed the acquittal respecting the first charge but allowed the appeal on the second charge under s. 4(a) ('the accepting charge'). However, following remittal for trial of the accepting charge to the Sessions Court, the applicant was against acquitted and discharged by the trial Court. The prosecution appealed whereupon the appellate Judge, allowing the appeal, convicted the applicant and sentenced him to three years' imprisonment and a fine of RM5,000 in default 12 months' imprisonment.

The appellate Judge, in convicting the applicant aforesaid, took into account *inter alia* the evidence of the applicant smiling and nodding his head when he was meeting PW3 and PW4 at the coffee house of the Grand Pacific Hotel, Kuala Lumpur. This apart, the appellate Judge had also considered two passages in the judgment of the learned trial Judge, wherein the said trial Judge respectively (i) explained why PW3 reported the matter to the ACA and (ii) disclosed how PW4 turned a prosecution witness. The applicant alleged that the appellate Judge, in referring to these evidence, had improperly reopened the evidence on which the applicant had been acquitted, and so applied to refer the following question to the Federal Court under s. 66 Courts of Judicature Act 1964, to wit, **"whether it is open to a second appellate Court to analyse, comment and take into account the evidence on a charge of which an accused person had been acquitted to support the conviction on a second remaining charge"**. The application was allowed and hence the hearing hereof.

Before the Federal Court, the applicant repeated the allegation aforesaid. That apart, he also contended that the appellate Judge (i) was wrong in holding that PW4 was not an accomplice (ii) had misdirected himself by finding that there was corroboration. Evidence further showed that in the course of arguing the question referred, the point was raised as to the extent to which the evidence adduced at the trial could be reviewed. The applicant argued that once a question of reference was allowed, the reference was a re-hearing and an applicant was entitled to deal with the entire evidence. The primary issues that arose were:

(i) whether the evidence adduced at the trial below is open to review by the present Court; and if so

(ii) whether the evidence pointed to a wrong conviction, such that the conviction ought to be reconsidered or corrected by the Federal Court.

Held:

Per Peh Swee Chin FCJ

[1] Where reference of questions had been allowed, the Court could embark upon a review of the evidence if justice so require. In adopting this view, what predominates the Court was that, if there was reasonable suspicion of a wrong conviction, opportunity ought, in the public interest, be given to have it considered and if appropriate be corrected.

[2] Even in cases where there have been a previous trial and a retrial, it does not mean that it is never permissible to refer to the earlier trial. Facts or evidence in the earlier trial may be admitted in the subsequent trial where such facts or evidence are relevant or necessary to establish some relevant fact e.g. in identifying the occasion on which some particular statement or admission was made or that some conduct took place.

[2a] The cardinal rule relating to evidence is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible. Therefore, on the question question posed, i.e. without reference to any particular evidence, the answer is in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in the present context, are principally ss. 5, 6, 7, 8 and 9 of the Evidence Act 1950, unless the exclusionary rules e.g. rules relating to hearsay apply.

[3] There was nothing wrong with the reliance that the appellate Judge had placed upon the evidence of the accused smiling and nodding in the company of PW3 and PW4 in the coffee house of the Grand Pacific Hotel, Kuala Lumpur, whilst the latter two were carrying on conversation in the Hokkien dialect. That evidence is relevant to both the first charge of soliciting and the second charge of receiving, and is admissible. The evidence is relevant to the second charge of receiving as being so connected as forming part of the same transaction though occuring at different time and place or as being conduct preparatory to receiving or bearing relation to the offence of receiving or explanatory of the nature of the transaction.

[4] It was right and proper for the learned appellate Judge to have referred to the matters contained in the two passages because they were related to the charge of accepting. The matters contained in the two passages took place after the meeting at the Grand Pacific Hotel. The matters are so connected with the offence of accepting charge as to form part of the evidence upon which it is to be proved and may be properly considered.

[5] To be capable in law of constituting corroboration, the evidence must (i) in itself be admissible (ii) come from a source independent of the evidence requiring to be corroborated and (iii) be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

[5a] In the instant case, PW4's indication of settling the gaming case against PW2 was amply corroborated by the evidence of PW2 and PW3. There is also the evidence of PW3 that he delivered the marked currency notes of RM15,000 to PW4 in the toilet at the Court precincts on the morning of 28 November 1992. As regards the events in the accused's chambers, PW4's evidence of handing over the RM15,000 to the accused, his giving the prearranged signal upon re-emerging from the chambers whereupon the door was locked and the accused started counting the money, and his seeing the accused releasing the money when PW5 and PW6 rushed in upon the door being open, were materially corroborated by the evidence of PW5 and PW6. The contention of lack of corroborative evidence is therefore unsustainable.

[6] The learned Judge had adequately considered the defence case. The degree or extent to which defence evidence needs be examined would depend on particular facts and circumstances of each case and the issues involved. In any event, in the instant case, once it was proved that the money RM15,000 had been given to or received by the accused, the

presumption under s. 14 of the Act arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case. It was then for the accused to give an innocent explanation which the Court considered more likely than not that it was true.

[6a] On the facts and the applicable law, the accused had failed to raise any reasonable doubt on the prosecution case. The learned appellate Judge had more than sufficient grounds and was right in reversing the order of acquittal and discharge of the accused and substituting therefor the order of conviction.

[7] Under the law there is no presumption of PW4, even assuming that he was an accomplice, being unworthy of credit by the mere reason of his delivering the money to the accused. There is not even a suggestion that PW4 had maliciously wanted to harm the accused.

[8] The imposition of the fine of RM5000 in default 12 months' imprisonment in addition to the prison sentence of 3 years is wrong in principle, since there is clear evidence that the accused has not profited from his wrong doing. The 3-year imprisonment sentence is already sufficient punishment. The sentence of 3 years' imprisonment is confirmed but the fine of RM5000 in default 12 months' imprisonment is set aside.

[Conviction affirmed. Sentence altered accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG JENAYAH: *Menerima suapan secara salah - Seksyen 4(a) Akta Pencegahan Rasuah 1961 - Samada sabitan wajar - Samada disokong oleh keterangan - Samada kes pembelaan dipertimbangkan secukupnya - Akta Pencegahan Rasuah 1961 ss. 3(10)(a), 4(a)*

PROSEDUR JENAYAH: *Rujukan persoalan undang-undang kepada Mahkamah Persekutuan - Seksyen 66 (dimansuhkan) Akta Mahkamah Kehakiman 1964 - Perbicaraan - Keterangan dikemukakan dalam Mahkamah di bawah - Samada terbuka untuk dikajikan semula oleh Mahkamah Persekutuan*

PROSEDUR JENAYAH: *Penghukuman - Menerima suapan secara salah - Seksyen 4(a) Akta Pencegahan Rasuah 1961 - Hukuman komposit pemenjaraan dan denda - Tertuduh tidak mendapat keuntungan daripada perbuatan salah - Samada hukuman denda tambahan tidak wajar*

KETERANGAN: *Keboleh-terimaan - Keterangan dalam perbiacraan yang lebih awal - Samada boleh diterima masuk dalam perbicaraan yang berikutnya di mana keterangan yang sedemikian relevan kepada fakta-fakta yang dijadikan isu - Akta Keterangan 1950 ss. 5, 6, 7, 8, 9*

KETERANGAN: *Keboleh-terimaan - Tuduhan meminta dan menerima suapan secara salah - Tertuduh dibebaskan daripada tuduhan meminta tetapi disabitkan atas tuduhan menerima - Keterangan berhubung tuduhan meminta - Samada boleh diterima masuk untuk membuktikan tuduhan menerima - Sama keterangan sebegitu berkaitan sehingga menjadi sebahagian dari transaksi yang sama - Akta Keterangan 1950 ss. 5, 6, 7, 8, 9 - Akta Pencegahan Rasuah 1961 ss. 3(a)(i), 4(a)*

Pemohon, dahulunya seorang Majistret yang berkhidmat di Mahkamah Majistret di Kuala Lumpur, telah dituduh dalam Mahkamah Sesyen atas dua kesalahan di bawah ss. 3(a)(i) dan 4(a) masing-masingnya Akta Pencegahan Rasuah 1961 ('Akta'), kerana meminta dan menerima secara salah untuk dirinya suapan sebanyak RM15,000 sebagai pendorong untuk membebaskan dan melepaskan seorang yang bernama Wong Sow Ying ('PW2') atas kesalahan tertentu. Suapan tersebut dikatakan diminta dan diterima oleh pemohon daripada PW4 melalui seorang bernama Por Chook Aik ('PW3').

Fakta menunjukkan bahawa PW2 telah dituduh di hadapan pemohon untuk kesalahan di bawah s. 4A(a) Akta Rumah Judi Terbuka, 1953. Pemohon kelihatannya telah memberitahu PW4, seorang jurubahasa Mahkamah, bahawa PW2 boleh dilepaskan sekiranya terdapat tawaran sebanyak RM15,000. Satu pertemuan kemudianya telah diadakan antara pemohon, PW3 dan PW4 di Grand Pacific Hotel, Kuala Lumpur. Keterangan antara lain menunjukkan bahawa di perjumpaan itu, pemohon kelihatan tersenyum dan menganggukkan kepadanya ketika PW3 dan PW4 sedang berunding dalam bahasa Hokkien mengenai perlepasan kes perjudian itu. PW3 kemudiannya telah melaporkan hal itu kepada Badan Pencegah Rasuah ('BPR') dan akibatnya PW4 telah diberkas oleh BPR. PW4 bersetuju untuk memberi kerjasama kepada BPR dan berjanji untuk berjumpa pemohon dalam kamarnya untuk menyerahkan kepadanya RM15,000 wang kertas yang telah bertanda. Ini telah dilakukan oleh PW4, dan pemohon akibatnya telah ditahan dan dituduh seperti di atas. Testimoni yang diberikan oleh pegawai-pegawai BPR ('PW5 dan PW6') menunjukkan bahawa dalam kamar itu, pemohon dilihat memegang dan menjatuhkan wang itu ke lantai.

Hakim Mahkamah Sesyen yang bijaksana telah membebaskan pemohon atas kedua-dua tuduhan tanpa memanggil pembelaan, memutuskan bahawa tidak terdapat kes *prima facie* terhadap pemohon. Ketika rayuan, Mahkamah Tinggi mengesahkan pembebasan berhubung dengan tuduhan pertama tetapi telah

membenarkan rayuan atas tuduhan yang kedua di bawah s. 4(a) ('tuduhan menerima'). Walaubagaimana pun, berikutan arahan supaya Mahkamah Sesyen membicarakan kes berkenaan tuduhan menerima, pemohon telah sekali lagi dibebaskan dan dilepaskan oleh Mahkamah tersebut. Pihak pendakwaan telah merayu dan Hakim rayuan, dalam membenarkan rayuan, telah mensabitkan pemohon dan menjatuhkan hukuman penjara selama tiga tahun dan denda sebanyak RM5000 dan jika mungkir penjara selama 12 bulan.

Hakim rayuan, dalam mensabitkan pemohon seperti di atas, telah mengambilkira antara lainnya keterangan mengenai pemohon tersenyum dan menganggukkan kepalanya ketika beliau bertemu dengan PW3 dan PW4 di coffee house Hotel Grand Pacific, Kuala Lumpur. Hakim rayuan juga telah mengambilkira dua rangkap dalam penghakiman Hakim perbicaraan yang bijaksana, di mana Hakim perbicaraan tersebut (i) menerangkan mengapa PW3 telah melaporkan perkara itu kepada BPR dan (ii) mendedahkan bagaimana PW4 menjadi saksi pihak pendakwaan. Pemohon mengatakan bahawa Hakim rayuan, dalam merujuk kepada keterangan-keterangan ini, telah dengan tidak wajar membuka semula keterangan di atas yang mana pemohon telah dibebaskan, dan dengan yang demikian, telah memohon untuk merujuk persoalan berikut kepada Mahkamah Persekutuan di bawah s. 66 Akta Mahkamah Kehakiman 1964, iaitu, "**sama ada ianya terbuka kepada Mahkamah Rayuan yang kedua untuk menganalisa, mengulas dan mengambilkira keterangan sesuatu tuduhan di mana orang yang tertuduh telah dibebaskan bagi menyokong sabitan tuduhan kedua yang masih berkekalan".** Permohonan ini telah dibenarkan dan oleh itu berbangkitlah rayuan di sini.

Di hadapan Mahkamah Persekutuan, pemohon mengulangi pengataannya yang di atas. Juga ditegaskan bahawa Hakim rayuan (i) telah tersilap apabila memutuskan bahawa PW4 bukannya rakan sejenayah (ii) telah tersalah arah apabila memutuskan bahawa terdapat sokongan atau 'corroboration'. Keterangan selanjutnya menunjukkan bahawa sewaktu menghujahkan persoalan yang dirujuk, persoalan telah dibangkitkan berhubung dengan setakat mana keterangan yang dikemukakan di Mahkamah perbicaraan boleh dikaji semula. Pemohon berhujah bahawa sebaik sahaja sesuatu persoalan rujukan dibenarkan, rujukan itu adalah satu perbicaraan semula dan pemohon adalah berhak untuk mengkaji keseluruhan keterangan itu. Isu-isu utama yang berbangkit adalah:

(i) samada keterangan yang dikemukakan di perbicaraan di bawah adalah terbuka untuk dikaji semula oleh Mahkamah semasa; dan jika sedemikian

(ii) samada keterangan itu menunjukkan suatu sabitan yang salah, yang mana ianya harus ditimbang semula atau diperbetulkan oleh Mahkamah Persekutuan.

Diputuskan:
Oleh Peh Swee Chin HMP

[1] Di mana rujukan soalan-soalan telah dibenarkan, Mahkamah boleh memulakan kajian semula keterangan itu jika keadilan memerlukan sedemikian. Dalam menerima-pakai pandangan ini, apa yang mempengaruhi Mahkamah adalah bahawa, jika terdapat kesangsian yang wajar mengenai sabitan yang salah, peluang seharusnya diberikan demi kepentingan untuk menimbangkannya dan jika wajar hendaklah diperbetulkan.

[2] Bahkan dalam kes-kes di mana terdapat perbicaraan yang terdahulu dan perbicaraan semula, ianya tidak bermakna bahawa ianya tidak terbuka untuk merujuk kepada perbicaraan yang lebih awal. Fakta-fakta atau keterangan dalam perbicaraan yang awal itu boleh diterima masuk dalam perbicaran yang kemudian di mana fakta-fakta atau keterangan yang sedemikian adalah relevan atau perlu untuk menentukan fakta yang relevan, contohnya dalam mengenalpasti keadaan di mana sesuatu kenyataan tertentu atau pengakuan dibuat atau bahawa sesuatu perbuatan telah berlaku.

[2a] Kaedah utama berhubung dengan keterangan adalah bahawa, tertakluk kepada kaedah-kaedah pengecualian, kesemua keterangan yang cukup relevan kepada fakta-fakta yang menjadi isu boleh diterima. Dengan itu, berdasarkan soalan yang dikemukakan di sini, yang tidak merujuk kepada mana-mana keterangan secara khusus, jawapannya kepada persoalan tersebut adalah dalam bentuk affirmative, dengan syarat keterangan atas tuduhan meminta diterima masuk dengan wajarnya di perbicaraan tuduhan menerima, dan ianya boleh diterima masuk jika ianya memenuhi syarat undang-undang keterangan berhubung dengan kelevanan yang mana, dalam konteks semasa ini, adalah secara utamanya melibatkan ss. 5, 6, 7, 8 dan 9 Akta Keterangan 1950, kecuali kaedah-kaedah pengecualian contohnya kaedah-kaedah berhubung dengan khabar angin terpakai.

[3] Tidak ada salahnya bagi Hakim rayuan bergantung kepada keterangan mengenai tertuduh tersenyum dan menganggukkan kepala ketika berada bersama PW3 dan PW4 di cofee house Hotel Grand Pacific, Kuala Lumpur, ketika kedua-kedua pihak terkemudian itu sedang berbual dalam bahasa Hokkien. Keterangan itu adalah relevan kepada kedua-dua tuduhan meminta dan menerima, dan adalah boleh diterima masuk. Keterangan itu relevan kepada tuduhan kedua iaitu menerima kerana ianya sebegitu berkaitan sehinggakan membentuk sebahagian daripada traksaksi yang sama, walaupun berlaku pada waktu dan masa yang berlainan, atau sebagai merupakan kelakuan persediaan untuk menerima, atau sebagai

mempunyai perhubungan dengan kesalahan menerima atau pun menjelaskan sifat transaksi itu.

[4] Ianya betul dan wajar bagi Hakim rayuan yang bijaksana merujukkan perkara-perkara yang terkandung dalam kedua-dua rangkap itu kerana ianya mempunyai hubungan dengan tuduhan menerima. Perkara-perkara yang terkandung dalam kedua-dua rangkap itu berlaku selepas perjumpaan di Grand Pacific Hotel. Perkara-perkara itu amat berkaitan dengan kesalahan tuduhan menerima sehingga membentuk sebahagian daripada keterangan di mana tuduhan tersebut harus dibuktikan dan dengan itu boleh dipertimbangkan dengan sewajarnya.

[5] Untuk membentuk sokongan atau 'corroboration' di sisi undang-undang, keterangan itu mesti (i) dengan sendirinya boleh diterima masuk (ii) datang daripada sumber yang bebas daripada keterangan yang hendak disokong itu dan (iii) adalah sedemikian rupa hingga boleh menunjukkan, melalui pengesahan sesuatu butiran penting, bukan sahaja bahawa kesalahan yang dituduh itu telah dilakukan, tetapi juga bahawa ianya telah dilakukan oleh tertuduh.

[5a] Dalam kes semasa, tanda-tanda niat PW4 untuk menyelesaikan kes perjudian terhadap PW2 telah disokong dengan secukupnya oleh keterangan PW2 dan PW3. Terdapat juga keterangan PW3 bahawa beliau telah menyerahkan wang kertas sebanyak RM15,000 yang telah ditandakan kepada PW4 di dalam tandas di perkarangan Mahkamah pada pagi 28 November 1992. Berhubung dengan apa yang berlaku di dalam kamar tertuduh, keterangan PW4 bahawa dia menyerahkan wang RM15,000 itu kepada tertuduh, pemberian isyarat yang dipersetujui olehnya setelah muncul semula daripada kamar bilamana pintu dikunci dan tertuduh mula menghitung wang itu, dan bahawa beliau melihat tertuduh melepaskan wang itu apabila PW5 dan PW6 menyerbu masuk setelah pintu dibuka, disokong secara utamanya oleh keterangan PW5 dan PW6. Pengataan bahawa tidak terdapat keterangan yang menyokong adalah dengan itu tidak dapat dipertahankan.

[6] Hakim yang bijaksana telah menimbangkan secukupnya kes pembelaan. Tahap atau had di mana keterangan pembelaan itu harus ditimbang akan bergantung kepada fakta-fakta dan halkeadaan setiap satu kes serta isu-isu yang terlibat. Walau apa pun, dalam kes ini, sebaik sahaja telah dibuktikan bahawa wang sebanyak RM15,000 itu telah diberikan kepada atau diterima oleh tertuduh, tanggapan di bawah s. 14 Akta berbangkit bahawa wang itu telah diberikan dan diterima secara salah sebagai satu pendorong atau ganjaran bagi melepaskan PW2 atas kesalahannya dalam kes jenayah

tersebut. Ianya kemudian terpulang kepada tertuduh untuk memberikan penjelasan tidak bersalah yang kebenarannya lebih menyakinkan Mahkamah daripada sebaliknya.

[6a] Berdasarkan fakta dan undang-undang yang terpakai, tertuduh telah gagal untuk membangkitkan sebarang keraguan yang wajar atas kes pendakwaan. Hakim rayuan yang bijaksana mempunyai alasan yang lebih daripada mencukupi dan bertindak betul dalam mengakaskan perintah pembebasan dan perlepasan dan menggantikan baginya perintah sabitan.

[7] Di bawah undang-undang, tidak terdapat tanggapan bahawa PW4, walaupun dengan menganggapnya sebagai seorang rakan sejenayah, tidak layak dipercayai hanya kerana beliau menyerahkan wang berkenaan kepada tertuduh. Tidak terdapat saranan bahawa PW4 mempunyai niat jahat untuk memudaratkan tertuduh.

[8] Pengenaan hukuman denda sebanyak RM5,000 dan jika mungkir hukuman penjara selama 12 bulan yang ditambahkan kepada hukuman penjara selama 3 tahun adalah salah menurut prinsip, kerana terdapat keterangan yang jelas bahawa tertuduh tidak mendapat apa-apa keuntungan daripada perbuatan salahnya. Hukuman penjara selama 3 tahun itu sudah memadai. Hukuman penjara selama 3 tahun, dengan itu, disahkan tetapi hukuman tambahan denda sebanyak RM5000 dan jika mungkir dipenjara selama 12 bulan tersebut diketepikan.

[Sabitan disahkan. Hukuman diubah sekadarnya.]

Cases referred to:
PP v. Kilbourne [1973] AC 729 ***(refd)***
Wong Foh Hin v. PP [1964] 30 MLJ 149 ***(refd)***
PP v. Loh Swee Kon & Anor. [1951] 17 MLJ 159 CA ***(refd)***
Sambasivam v. PP, Federation of Malaya [1950] 16 MLJ 145 PC ***(refd)***
R v. Hay 77 Cr. App R. 70 CA ***(refd)***
R v. Binham [1991] Crim LR 774 CA ***(refd)***
Khoo Cheng Huat v. PP [1991] 1 MLJ 42 ***(dist)***
Murugiah v. PP [1950] 16 MLJ 282 ***(over)***
Tan Yin Yen v. PP [1973] 2 MLJ 143 FC ***(refd)***
Yue Sang Cheong Sdn. Bhd. v. PP [1973] 2 MLJ 77 FC ***(refd)***
Yap Ee Kong & Anor. v. PP [1981] 1 MLJ 144 ***(refd)***
Ragunathan v. Pendakwa Raya [1982] 1 MLJ 139 FC ***(refd)***
PP v. D'Fonseka [1958] 24 MLJ 102 CA ***(cit)***
PP v. Lawrence Tan Hui Seng (Supreme Court Criminal Reference No. 06-8-90) ***(refd)***
R v. Baskerville [1916] 2 KB 658 ***(refd)***
Muniandy & Anor. v. PP [1973] 1 MLJ 179 ***(cit)***
Loo Chuan Huat v. PP [1971] 2 MLJ 167 ***(cit)***

Ah Mee v. PP [1967] 1 MLJ 220 ***(cit)***
Ng Seng Huat & Anor. v. PP [1966] 1 MLJ 210 ***(cit)***
PP v. Sarjeet Singh & Anor. [1994] 2 MLJ 290 ***(cit)***
PP v. Chong Boo See [1988] 1 MLJ 292 ***(cit)***
Jegathesan v. PP [1980] 1 MLJ 165 ***(cit)***
PP v. Ku Hang Chua [1975] 2 MLJ 99 ***(cit)***
Chandrasekaran & Ors. v. PP [1971] 1 MLJ 153 ***(cit)***
Gurbachan Singh v. PP [1966] 2 MLJ 125 ***(cit)***
Mohamed Ali & Anor. v. PP [1965] 31 MLJ 261 ***(cit)***
DPP v. Kilbourne [1973] AC 729 ***(refd)***
Gooi Loo Seng v. PP [1993] 2 MLJ 137 ***(dist)***
Khoon Chye Hin v. PP [1961] 27 MLJ 105 ***(foll)***
PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(cit)***

Legislation referred to:
Common Gaming House Act 1953, s. 4A(a)
Courts of Judicature Act 1964, s. 66
Evidence Act 1950, ss. 6, 7, 8, 9, 10
Evidence Ordinance (Cap. 43) (Sabah), s. 8
Prevention of Corruption Act 1961, s. 3(a)(i), 4(a), 14, 18

Other source referred to:
The Indian Evidence Act, Sir James Stephen, p. 55
Sarkar on Evidence, 14th Edn. 1993, Vol. 1, p. 125
Phipson on Evidence, 8th Edn., p. 127

For the applicant - Christopher Fernando (Sashi Menon & Idrus Ibrahim with him); M/s. Majid, Krishna, Menon & Lee
For the respondent - Zulkifli bin Bakar SFC (Ahmad bin Bache, DPP with him)

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

This case came before us by way of a reference under s. 66 of the Courts of Judicature Act 1964. The said s. 66 was repealed on 24 June 1994. However, leave was granted prior to that. The question permitted to be brought up for determination is:

> Whether it is open to a second Appellate Court to analyse, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge.

Previous Proceedings

At the material time, the applicant was a Magistrate serving in the Magistrates' Court at Jalan Duta, Kuala Lumpur. Initially he was tried on the following two charges before the Sessions Court in Kuala Lumpur:

(a) under s. 3(a)(i) of the Prevention of Corruption Act 1961, for **corruptly soliciting** for himself a sum of RM15,000 from one Wong Sow Ying through one Por Choo Aik alias William as an inducement to acquit and discharge the said Wong Sow Ying of an offence in a criminal case (hereinafter referred to as "the charge of soliciting.")

(b) under s. 4(a) of the Prevention of Corruption Act 1961 for **corruptly accepting** for himself a sum of RM15,000 from one Por Choo Aik through one Ong Leong Chuan as an inducement to acquit and discharge one Wong Sow Ying of an offence in a criminal case (hereinafter referred to as "the charge of accepting").

On 8 March 1993 the learned Sessions Court Judge discharged and acquitted the applicant of both charges without calling for the defence, ruling that no *prima facie* case against the applicant had been made out.

On appeal by the prosecution, the High Court affirmed the acquittal and discharge respecting the 1st charge under s. 3(a)(i) of the Prevention of Corruption Act 1961 but allowed the appeal on 2nd charge under s. 4(a) of the said Act and ordered the applicant to enter upon his defence in respect thereof. The case was thus sent back before the same learned Sessions Court Judge who, after hearing the defence, again acquitted and discharged the applicant of the 2nd charge. Once more the prosecution appealed to the High Court against the acquittal and discharge. On 25 April 1994, the learned appellate Judge (other than the Judge hearing the 1st appeal), after hearing arguments, allowed the appeal by the prosecution, set aside the acquittal, convicted the applicant and sentenced him to three years' imprisonment and a fine of RM5,000 in default 12 months' imprisonment.

The Question Referred

Now coming back to the question referred and set out above. The question is of a general nature without alluding to any part of the evidence allegedly having been "analyse comment and taken into account." However, in the course of his submission, learned Counsel for the applicant referred to certain parts of the evidence respecting which he argued that the learned Judge should not have relied on. The learned Deputy Public Prosecutor, on the other hand, contended otherwise. We shall refer to these later.

On the general question as posed i.e. without reference to any particular evidence, the answer, in our view, may be found in ss. 6, 7, 8 and 9 of the Evidence Act 1950. The sections are set out below:

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

7. Facts which are the occasion, cause or effect, immediate or otherwise of relevant facts or facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction, are relevant.

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

The above sections (as well as s. 10 of the said 1950 Act) deal with facts and conducts which are specifically connected with facts in issue. These sections have been described as intended "to enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings" See Sir James Stephen, *The Indian Evidence Act*, p. 55)

The term "transaction" in s. 6 had been defined by Sir James Stephen, the author of the Bill which later became the Indian Evidence Act 1872, "as a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue." In each case, the Judge has to decide according to the circumstances, drawing the line between the facts which are so connected with the fact in issue as to be part of the same transaction and facts which are beyond that limit. No precise limits can be prescribed. In some cases the transactions lie within narrow limits of time; in other cases they may be spread over a long period. (See *Sarkar on Evidence* 14th Edn. 1993, Vol. 1 p. 125.) In some cases, two facts occurring at the same time and place may have no connection between them; but in other cases two facts separated by a vast

distance of time and place may be parts of the same transaction. As stated earlier, it all depends on the circumstances of each case. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected by such factors as the proximity of time, proximity or unity of place, continuity of action, and community of purpose or design.

In *Phipson on Evidence* 8th Edn. at p. 127 it is said that generally all preliminary acts, whether criminal or not, rendering the crime more easy, safe, certain and effective, are receivable as in the nature of preparations.

Of the law of evidence, the cardinal rule relating to relevancy is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible. In *PP v. Kilbourne* [1973] AC 729 at p. 756 Lord Simon of Glaisdale spoke of 'relevance' thus:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in "logical probativeness", except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

In *Wong Foh Hin v. PP* [1964] 30 MLJ 149 the appellant was charged with the murder of his daughter. There was evidence that three months before the daughter's death, the appellant had "interferred" with his daughter and the matter had been disposed of with a warning to the appellant if the incident occurred again, he would be reported to the police. The incident occurred again just before the daughter's death. The Federal Court held that evidence of the appellant's conduct on those previous occasions was admissible under s. 8 of the Evidence Ordinance (Cap. 43) (Sabah) which is *in pari materia* with s. 8 of the Evidence Act 1950, to show that he had the motive to murder his daughter, that is, to prevent her from reporting him.

For the, present reference, a case in point is *PP v. Loh Swee Kon & Anor.* [1951] 17 MLJ 159 CA. In that case the accused had previously been acquitted of the charge of consorting under reg. 5(1) of the Emergency Regulations 1948. Subsequently he was charged with the offence of carrying a firearm under reg. 4 of the same Regulations. To substantiate the charge, an attempt was made to call as a witness the person with whom the accused was alleged to have consorted. The learned Judge ruled that any evidence which tended to show that the accused had been guilty of the offence of consorting was inadmissible upon the charge of carrying a firearm. As a result the witness

was not called. By way of a reference, the Federation Court of Appeal was called upon to determine the following somewhat differently worded question:

> Whether evidence, otherwise relevant and admissible, which shows or tends to show that an accused person had committed an act constituting an offence or part of an offence in respect of which he has been acquitted at a connected with the offence subsequently charged as to form part of the evidence upon which it is to be proved.

Delivering the judgment of the Court, Brown Ag. CJ (Singapore) (as he then was), answered the question referred thus: (at 161 left col.)

> The law is that evidence which shows or tends to show that an accused person was guilty of an offence of which he had been acquitted is admissible at a subsequent (or the same) trial upon a different charge, provided that (a) the evidence is so connected with the offence charged as to form part of the evidence upon which it is to be proved, and (b) the evidence would not have been sufficient to establish the charge of which the accused was acquitted. To this extent, and with the limitation contained in (b), our answer to the question put to us is that such evidence is not inadmissible.

Also, in a retrial of an accused, evidence of relevant facts in the earlier trial of a different charge may sometimes be referred to. In *Sambasivam v. PP, Federation of Malaya* [1950] 16 MLJ 145 PC the accused was originally charged with two offences: (1) carrying a firearm and (2) being in possession of ammunition, both capital offences under the Emergency Regulations 1948. He had been badly wounded in an incident. The same day he was alleged to have made a statement which was a confession to both charges: he denied making the statement. At the trial the assessors acquitted him of both charges. The learned Judge accepted the verdict of acquittal of the ammunition charge. However, he did not agree with the verdict to the firearm charge and ordered a retrial of that charge. At the retrial, the assessors were not told of the acquittal on the ammunition charge and they convicted the accused on the firearm charge. The Privy Council quashed the conviction. In the judgment of the Board delivered by Lord MacDermott, the following passage is of interest to the issue in our present case:

> ... the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant to his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him for at the first trial the facts proved in support of the one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other. (pg. 151 1st col.)

In *R v. Hay* 77 Cr. App. R. 70 CA, the appellant/accused was alleged to have made a statement to the police admitting two unrelated offences – burglary and arson. He was tried first on the arson charge and was acquitted, having asserted that the admissions were fabricated and having called alibi witnesses. The details of the burglary admission were "edited out" at the trial. At the trial for burlary, at the defence request, the whole of the statement under caution was put before the jury as the accused was going to assert that the burglary admission was also fabricated and rely upon the previous acquittal in support of that defence. The trial Judge, however, refused to admit the evidence of acquittal. The defence also applied for leave to call the alibi witnesses in the arson case in order to prove that that part of the statement made by the appellant was untrue. The trial Judge also refused the application. On appeal, the conviction was quashed. On the request to adduce the alibi evidence, the Court of Appeal, contrary to the ruling of the trial Judge, held that the alibi evidence relating to the arson was also admissible in the burglary charge. On the last point, O' Connor LJ said (at p. 75):

> When the challenge is made to the truth of a confession statement, if it be that there is independent evidence which if believed demonstrates that a material part of the statement must be untrue, then it seems to us that the defendant is entitled to have that evidence put before the jury. ... The defence was that the whole statement had been fabricated and the alibi evidence to the arson confession **would be relevant** to that issue. The fact that the admission of the alibi evidence might have enlarged the scope of the burglary trial cannot be helped ... (Emphasis added)

In *R v. Binham* [1991] Crim LR 774 CA it was held that the prosecution had rightly been permitted to adduce evidence on a retrial of what had been said on oath by the defendant at the original trial for the purpose of establishing that he had lied.

Thus, in our view, even in cases where there have been a previous trial and a retrial, it does not mean that it is never permissible to refer to the earlier trial. Facts or evidence in the earlier trial may be admitted in the subsequent trial where such facts or evidence are relevant or necessary to establish some relevant fact e.g. in identifying the occasion on which some particular statement or admission was made (as per Lord MacDermott in *Sambasivam v. PP, Federation of Malaya, supra*) or that some conduct took place.

Therefore, on the question of general nature as raised and in the context of the case presently under reference without pinpointing to any particular piece of evidence, it is our view that the answers in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence

relating to relevancy which, in our present context, are principally ss. 5, 6, 7, 8 and 9 of the Evidence Act 1950 (i.e briefly, if the evidence constitutes facts in issue, or if the evidence constitutes collateral facts which (i) form part of the same transaction, or (ii) are the immediate occasion, cause, or effect of fact in issue, or (iii) show motive, preparation, or conduct affected by a fact in issue, or (iv) are necessary to be known in order to introduce or explain some relevant fact) unless the exclusionary rules e.g. rules relating to hearsay apply.

Specific Evidence Raised

We shall now deal with the specific evidence which Counsel for the applicant, in the course of his submission before us, contended that the learned appellate Judge should not have relied on:

(1) the evidence of the accused smiling and nodding his head in the company of PW3 William Por and PW4 Ong in the coffee house of the Grand Pacific Hotel, Kuala Lumpur, whilst the latter two were carrying on conversation in the Hokkien dialect. There is evidence that among the matters discussed between PW3 and PW4 was the sum of RM15,000 in settlement of the criminal case.

Pausing here, one may consider a different situation. Supposing the applicant had only been charged with the offence of accepting, would the aforesaid evidence of the applicant smiling and nodding have been relevant? We have no doubt that it would. In the instant case under reference, the evidence, in our view, is clearly relevant to both the 1st charge of soliciting and the 2nd charge of receiving, and is admissible. The evidence is relevant to the 2nd charge of receiving as being so connected as forming part of the same transaction though occurring at different time and place or as being conduct preparatory to receiving or bearing relation to the offence of receiving or explanatory of the nature of the transaction).

Learned Counsel for the applicant cited *Sambasivam v. PP* [1950] 16 MLJ 145 PC to which we have referred in the earlier part of this judgment. In *Sambasivam* case the conviction on the charge of carrying firearm was set aside because of the failure to inform the assessors of the earlier acquittal of the appellant on the charge of possession of ammunition thereby rendering uncertainty as to how the assessors would have reacted had they been so informed. In the instant case before us, the learned appellate Judge, in making reference to the meeting of PW3, PW4, and the accused, and the

conduct of the accused in the coffee house of the Grand Pacific Hotel, was fully aware of the acquittal on the charge of soliciting as is clearly demonstrated when the learned appellate Judge said: (p. 25 of the Appeal Record)

> In the final analysis, however, the High Court gave the benefit of doubt and dismissed the appeal against the acquittal on that charge.
>
> So we are left with the appeal on the one (or what was previously the second) charge.

It is significant to note that after making the above quoted observation, the learned appellate Judge, in discussing the charge of accepting in his judgment, did not make any reference to the incident at the coffee house of the Grand Pacific Hotel.

(2) Next, learned Counsel for the applicant referred to the following two passages which the learned appellate Judge described as "facts as found by the learned Sessions Court Judge:

(i) **Lanjutan kepada beberapa siri perbincangan mengenai bayaran RM15,000** diantara lain SP3 telah meminta kepada SP4 supaya bayaran RM15,000 itu dapat dikurangkan. SP4 telah memberitahu SP3 bahawa permintaan ini tidak dapat dipersetujui. Ini, menurut SP3, telah menimbulkan kemarahannya dan telah mendorong beliau membuat pengaduan kepada BPR.

(Translation in English:

> Following a series of discussions regarding the payment of RM15,000 amongst others, SP3 asked SP4 for the sum of RM15,000 to be reduced. SP4 informed SP3 that the request was not agreeable. This, according to SP3 angered him and prompted him to report to the BPR.

(ii) Berikutan dengan ini pegawai-pegawai BPR telah menyerbu dan menahan SP4 dan telah dibawa balik ke pejabat BPR. Begitu juga dengan SP3. Siasatan telah dijalankan ke atas SP4. Sebagai balasan SP4, menawarkan untuk bekerjasama dengan BPR dan bersetuju untuk menolong memerangkap tertuduh dengan menyerahkan wang perangkap sebanyak RM15,000 kepadanya.

(Translation in English:

> As a result the BPR officers rushed in, detained SP4 and brought him back to the BPR office. Likewise with SP3. An investigation was carried out on SP4. In exchange SP4 offered to co-operate with BPR and agreed to assist trapping the accused by delivering the trap money of RM15,000 to him.

The complaint of the applicant respecting the above two passages was that the learned appellate Judge had re-opened the evidence on which the applicant had been acquitted.

For the respondent, the learned Senior Federal Counsel submitted that the matters contained in the two passages related to the charge of accepting, and it was right and proper for the learned appellate Judge to refer to them.

We agree with the learned Senior Federal Counsel. The matters contained in the two passages took place after the meeting at the Grand Pacific Hotel. In our view, they are so connected with the offence of accepting charged as to form part of the evidence upon which it is to be proved and may be properly considered: whereas the matters in passage (i) explain why PW3 reported the matter to the Anti-Corruption Agency, those in passage (ii) disclose how PW4 turned a prosecution witness. Indeed, without such evidential facts the case of the prosecution would have been rendered a great deal less intelligible. We would also add that the matters in the two passages aforesaid, in themselves, would not have been sufficient to establish the charge of soliciting of which the applicant had been acquitted.

Learned Counsel for the applicant cited *Khoo Cheng Huat v. PP* [1991] 1 MLJ 42 where the appellant charged in the Sessions Court with two offences of (1) soliciting and (2) accepting gratification was acquitted and discharged of the charge of soliciting but convicted of accepting, and, on appeal to the High Court, was acquitted of the accepting charge. The facts and circumstances in that case were different. There, the events occurred on the same date, at the same time and place. The principal witnesses were the complainant and his wife, and their evidence (so the High Court held) must have been rejected because of the acquittal of the soliciting charge by the Court of the first instance. Edgar Joseph J (as he then, was), hearing the appeal, said: (p. 45 rt. col. B-C)

> In such a situation, bearing in mind that the alleged act of soliciting and that of accepting were so intermingled as to make it impossible to separate them, and they depended for their proof upon the same witnesses, that testimony should in all fairness, have been rejected in, it entirety.

In the instant case under reference, the events relating to the two charges occurred at different places and on different dates and times. More importantly, the money recovered in the applicant's chambers shortly after the handing over was the same money entrusted to PW4 minutes before PW4 entered the applicant's chambers.

Learned Counsel for the applicant also relied on *Murugiah v. PP* [1950] 16 MLJ 282. We need only say that that case had been overruled in so far as it purported to be authority for excluding any evidence which tended to show that the accused was guilty upon a charge of which he had been acquitted in considering his guilt upon another charge. See *PP v. Lo Swee Kon & Anor*. [1951] 17 MLJ 159 CA.

Review of Evidence on a Reference

It must be borne in mind at the outset that leave had already been previously granted for the question in this reference to be referred, and we are here to deal with the question.

In the course of arguing the question referred, the point was raised as to the extent to which evidence adduced at the trial could be reviewed. For the applicant, learned Counsel argued that once a question for reference was allowed, the reference was a re-hearing and an applicant was entitled to deal with the entire evidence. The learned Senior Federal Counsel, on the other hand, contended otherwise. He submitted that review of the entire evidence could be allowed only in exceptional circumstances within which the present case under reference did not fall.

The care required to be exercised in guarding against references being turned into an appeal may be seen in the observation of Suffian Ag. CJ (as he then was) in *Tan Yin Yen v. PP* [1973] 2 MLJ 143 FC where, in delivering the oral judgment of the Court, he said:

> It is to be observed that questions of law which may be referred to us under s. 66 should not be questions that are of personal interest only to the accused or to the Public Prosecutor but should be questions that are of public interest, and it seems to us better if the High Court were to exercise their discretion under

> s. 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

Perhaps the above observation may more appropriately be regarded to serve as a caution in considering whether to grant leave for questions to be referred.

But where reference of questions had been allowed, authorities tend to lean in favour of embarking upon a review of the evidence should justice so require. In the majority decision of *Yue Sang Cheong Sdn. Bhd. v. PP* [1973] 2 MLJ 77 FC Ong CJ said: at p. 78 left col.)

> My perusal of the evidence on record, however, has left my mind in grave doubt about the guilt of the applicant. Notwithstanding the answers to the questions of law posed in this reference, it is nevertheless the paramount duty of this Court see that, in the last resort, justice is done and any miscarriage of justice rectified.

And later he continued: (at p. 79 left col.)

> At the hearing of this reference we asked Counsel for further argument on the question whether this Court had any jurisdiction or power to go beyond answering the questions of law, if we are satisfied on perusal of the evidence on record that the conviction was wrong. On the one hand it was said that the Federal Court has no powers of review; if this is the correct view, then naturally, if the answers do not require that the judgment of the Court below be disturbed, this Court cannot do anything more than answer the questions raised.
>
> For my own part, however, I feel that it is not only the right, but also the duty of this Court to see that justice is done and seen to be done in all cases brought before us in accordance with established rules of procedure. As Viscount Radcliffe said in *Ibralebbe v. Reg.*[(2)] "Justice is **owed**, it is not granted by favour or accorded at discretion." If, in the instant case, the conviction was wrong, by reason of its being against the weight of evidence, it surely cannot be right for this Court to wear blinkers and treat the questions of law raised as being purely of academic interest and thus allow the conviction to stand.

In *Yap Ee Kong & Anor. v. PP* [1981] 1 MLJ 144 the Federal Court consisting of five distinguished Judges turned the reference into an appeal and proceeded accordingly. In the subsequent case of *A. Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139 FC, Raja Azlan Shah Ag. LP (as His Royal Highness then was), in delivering the judgment of the Federal Court, had occasion to consider and describe *Yap Ee Kong* case, *supra*, and *PP v. D' Fonseka* [1958] 24 MLJ 102 CA as cases involving "misdirections in law and this Court had no hesitation to intervene because they called for discussion of alternative views. (at p. 142).

In *PP v. Lawrence Tan Hui Seng* (Supreme Court Criminal Reference No. 06-8-90) the Supreme Court, following *Yue Sang Cheong Sdn. Bhd. v. PP, supra*, reviewed the entire evidence besides answering the questions raised in the reference.

It was on the above authorities and having regard to the initial submissions of Counsel for both sides that we acceded to the request of Encik Christopher Fernando of Counsel for the applicant to review the evidence with equal opportunity afforded to the learned Senior Federal Counsel to respond thereto. In the particular circumstances of the instant case, predominant in our mind was that if there was reasonable suspicion of a wrong conviction of the offence, opportunity ought, in the public interest, be given to have it re-considered and, if appropriate, be corrected.

The Evidence and the Facts

Before proceeding further, it would be useful to set out, briefly, the pertinent evidence adduced and the facts arrived at in relation to the charge of accepting.

The complainant, PW2 Wong Sow Ying, was charged in the applicant's Court with an offence under s. 4A(a) of the Common Gaming House Act 1953. PW4, Ong Leong Chuan, an interpreter of the Court, testified that in September 1992 the applicant (hereinafter referred to as "the accused") told him that the case could be discharged (dibebaskan) if there was an offer of RM15,000. On 22 October 1992, PW4 approached PW2 and told the latter that she could be freed on payment of RM15,000. PW2 then enlisted the assistance of PW3 William Por Choo Aik (the employer of PW2's son) to negotiate the payment of the said amount. Subsequently PW3 met PW4 whom he previously knew. Through their arrangement a lunch was held in the coffee house of the Grand Pacific Hotel. There is evidence from PW3 and PW4 that at the lunch they negotiated in the Hokkien dialect regarding the payment of RM15,000 for the accused and that during the negotiation the accused, who was present, smiled and nodded his head when his name was mentioned.

There is evidence from PW3 that as a result of PW2 seeking his financial assistance towards payment of the said sum of RM15,000, PW3 attempted to get a reduction of the amount but failed. This prompted PW3 to report the matter to PW5 Woon Kok Haw of the Anti-Corruption Agency.

On 27 November 1992, PW4 was arrested by the Anti-Corruption Agency in front of the Sakura Restaurant during a meeting between PW2, PW3 and PW4 when PW3 was to hand over the sum of RM15,000 to PW4. This sum of RM15,000 in currency notes were previously given to PW3 by the Anti-Corruption Agency and marked. There is evidence that after PW4's arrest,

PW4 agreed, at the instance of PW5, to co-operate with the Anti-Corruption Agency in bringing the accused to book.

On 28 November 1992, PW3 and PW4 went together to the Court with the same marked currency notes of RM15,000 intending to see the accused. However, PW4 subsequently told PW3 that the accused would only see PW4. Hence PW3 handed over the marked currency notes to PW4 in the toilet. Thereafter PW4 went to see the accused in the latter's chambers where he handed over the currency notes to the accused. PW4 then went out of the accused's chambers when a process server Rajendran entered; and as directed by the officers of the Anti-Corruption Agency, he (PW4) gave a pre-arranged signal indicating to PW5 who was outside that the money had been handed over to the accused. Thereafter PW4 re-entered the accused's chambers. According to PW4, the accused then locked the chambers and counted the money. Upon hearing sounds attempting to open the door of the chambers, PW4 opened the door whereupon PW5 and PW6 (Anti-Corruption Agency officers) entered the chambers and the accused was seen letting off the money which dropped onto the floor.

In his defence, the accused denied giving any indication to PW4 that PW2's case could be settled for $15,000 and accepting the sum. He, however admitted that there was the lunch at the Grand Pacific Hotel which, he said, was organised by PW4 in conjunction with the accused's impending transfer to the Legal Aid Bureau, Penang. The accused admitted that he smiled when his name was mentioned during the conversation between PW3 and PW4 but only to show that he was following their conversation as he could neither speak nor understand Hokkien. As for the money $15,000 found on the floor of his chambers, he said he did not know how it came to be there and he came to know of its existence only upon its discovery by the Anti-Corruption Agency officers.

DW2 Aslam bin Zainuddin, a fellow magistrate, testified that after PW4 had given evidence in this case, PW4 told him that he (PW4) had to put the money in the accused's chambers because he was worried about his family and what would happen to them, and, according to DW2, PW4 appeared remorseful when he said this.

After perusing the case, the learned appellate Judge found the evidence against the accused overwhelming and that the defence evidence was insufficient to rebut the elements of the charge. On the entire evidence, he held the view that the trial Sessions Court "cannot fly in the face of the facts." He ruled out the probability of the money being planted to frame the accused. He found that the accused had failed to rebut or satisfactorily explain that the money

handed to him was not corrupt money. The learned appellate Judge then set aside the order of acquittal and discharge, found the accused guilty convicted and sentenced him accordingly.

Contentions for the Accused

We shall now deal with the defence contentions but in slightly different order from that in which they were presented to us. Before us, learned Counsel for the accused contended that the learned appellate Judge:

(1) was wrong in holding that PW4 Ong was not an accomplice;

and:

(2) had misdirected himself by finding that there was corroboration when there was none.

We decline to entertain contention (1) above, but would, for the purpose of this case, treat PW4 Ong as an accomplice. We decline for two reasons: firstly, on 4 May 1994, this Court composed of a different panel had, under an application pursuant to the then s. 66 of the Courts of Judicature Act 1964, given leave to refer the question now under consideration, but had not granted leave to refer the following question, i.e.

> Whether the character of a self-confessed accomplice assumes the character of an ordinary independent witness merely because the Investigating Agency intervenes by arresting him and insists that he completes the acts he had earlier undertaken to do as an accomplice.

Appropriateness of the phrasing of the question in the light of the facts and circumstances of the case apart, to deal with the contention canvassed now would, in effect, be entertaining what had been disallowed to be referred by this Court earlier. This we would not do; secondly, we did not have the benefit of hearing on the issue since Counsel for both sides did not advance any argument on the point. In our view, the interest of justice is served if we, as indicated earlier, treat PW4 Ong an accomplice.

This brings us to contention (2) of the accused i.e. that there was no corroboration.

In the celebrated case of *R v. Baskerville* [1916] 2 KB 658 Lord Reading CJ expressed the requirements of corroborative evidence thus (at p. 667):

> ... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also

> that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration it thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused Committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

R v. Baskerville, supra has been persistently followed by our Courts in numerous cases e.g. by the Federal Court in *Yap Ee Kong & Anor. v. PP* [1981] 1 MLJ 144, *Muniandy & Anor. v. PP* [1973] 1 MLJ 179, *Loo Chuan Huat v. PP* [1971] 2 MLJ 167, *Ah Mee v. PP* [1967] 1 MLJ 220, *Ng Seng Huat & Anor. v. PP* [1966] 1 MLJ 210; by the High Court in *PP v. Sarjeet Singh & Anor.* [1994] 2 MLJ 290, *PP v. Chong Boo See* [1988] 1 MLJ 292, *Jegathesan v. PP* [1980] 1 MLJ 165, *PP v. Ku Hang Chua* [1975] 2 MLJ 99, *Chandrasekaran & Ors. v. PP* [1971] 1 MLJ 153, *Gurbachan Singh v. PP* [1966] 2 MLJ 125, *Mohamed Ali & Anor. v. PP* [1965] 31 MLJ 261, to cite some.

In *DPP v. Kilbourne* [1973] AC 729 Lord Hailsham said: (at p. 741)

> In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration.

And, in the same case, Lord Reid said: (at p. 756)

> We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements, we should not accept them as corroborative.

The corroborating evidence must confirm the evidence requiring corroboration in at least one particular which is directly relevant to the issues in the case in that it tends to suggest not only that the offence charged has been committed but also that it has been committed by the accused. Such corroborating evidence may be direct or circumstantial.

Thus, to be capable in law of constituting corroboration, the evidence must:

(i) in itself be admissible

(ii) come from a source independent of the evidence requiring to be corroborated; and

(iii) be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

In the instant case, PW4's indication off setting the gaming case against PW2 was amply corroborated by the evidence of PW2 and PW3. There is also the evidence of PW3 that he delivered the marked currency notes of $15,000 to PW4 in the toilet at the Court-precincts in the morning of 28 November 1992. As regards the events in the accused's chambers on that same fateful morning, PW4's evidence of handing over the $15,000 (marked) to the accused, his giving the pre-arranged signal upon re-emerging from the chambers, his re-entering the chambers whereupon the door was locked and the accused started counting the money and his seeing the accused releasing the money when PW5 and PW6 rushed in upon the door being opened after attempt was made to open it, were materially corroborated by the evidence of PW5 and PW6. PW5 testified that when he rushed into the accused's chambers followed by PW6, he saw the accused holding the money in his hand and that upon seeing him, the accused dropped the money and attempted to step on it. PW5 said that at that material time the accused was standing between a steel cabinet and a table. PW6's evidence corresponded with that of PW5 in material particulars. He said that upon entering the accused's chambers, he saw the accused standing near a steel cabinet and that when the accused saw him, the accused let go of something which was in his hand. In this connection, it is pertinent to note that the search list (Exh. P8) stated that the $15,000 was found on the floor besides the steel cabinet. PW6 said that what fell down on the floor was $1,000 and $500 notes folded into two. Both PW5 and PW6 testified that the accused was shocked when he saw them entering his chambers.

We find the contention of lack of corroborative evidence unsustainable.

Another contention before us on behalf of the accused was that the learned appellate Judge failed to recognise the significance of the contents of the search list Exh. P.8. As mentioned earlier, the search list stated that the $15,000 was found on the floor beside the cabinet in the accused's chambers. Before the learned appellate Judge it was argued that the money was found only after a search. The learned appellate Judge disagreed with the Sessions Court Judge's interpretation that the word 'found' ('dijumpai') carried the connotation that before the money was found, a search was made or the money was already in the place where it was found. The learned appellate

Judge said in his judgment: "If every Court case has to fall into the abyss of semantics then the Court is another linguistics department."

Encik Christopher Fernando further contended before us that the search list was not given due consideration and weight in that it did not say that the money was thrown to the ground. *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 was cited in support of the proposition that when the matter stated in a search list differed from what a witness stated, the discrepancy was fatal to the prosecution case. We see no merit in the contention. In the case before us, there is no discrepancy between the evidence of the witnesses and the content of the search list Exh. P.8. As stated earlier, the cumulative testimonies of PW4, PW5 and PW6 show that the accused was handling the money and dropped it to the floor between the table and the steel cabinet when he saw PW5 and PW6 rush into his chambers. The search list made no mention of this but only stated that the money was found on the floor beside the cabinet. There is thus discrepancy so far as concerning the sum $15,000. It is not obligatory to state in the search list how the $15,000 came to be landed on the floor. This can be supplied by the testimonies of witnesses.

Gooi Loo Seng v. PP [1993] 2 MLJ 137 (a drug trafficking case) is clearly distinguishable. In that case there was a glaring discrepancy between the search list and Inspector Nordin's evidence as to who recovered the heroin. This was highly material as it affected the propriety of the inference on the custody and control of the heroin and knowledge of its nature.

It was also contended that the learned appellate Judge failed to consider the significance of the fact that PW4 refused to take a tape-recorder into the accused's chambers when delivering the money in the morning of 28 November 1992. On examination of PW4's evidence on the point, we think it more correct to say that he disagreed to bring the tape-recorder. When pressed under cross-examination, he said he did not know why he disagreed. Thus, on the evidence, there is no explanation for PW4's disagreeing to bring along the tape-recorder. Before us, learned Counsel for the accused did not at all submit how PW4's disagreement to do so had adversely affected the defence case. We see no merit in the contention.

Learned Counsel for the accused further submitted that the learned appellate Judge was wrong in saying that discrepancies and contradictions were the same thing. We must point out, with respect, that nowhere in his judgment did the learned appellate Judge say this. The relevant part of the judgment under the heading *"Discrepancies, Contradictions: how vital?"* is from pp. 30 to 36 of the Appeal Record. It contained 4 sub-heads i.e.

(a) Pager

(b) Evidence of bad character

(c) Is Ong SP4 the star witnesses, and

(d) a rejection of the trial Sessions Court Judge's interpretation of certain wording in the Search List Exh. P.8 with which we have already dealt earlier on.

We find no discrepancy or contradiction within each of the subheads (b), (c) and (d). As regards sub-head (a). The contradiction appears in the evidence of PW3 and PW4. Whereas PW3 said he did not buy a pager for PW4, PW4 said that PW3 gave him a pager in order to facilitate communication between them, and that this took place several months before the accused was arrested. From this contradiction, the trial Sessions Court Judge remarked that there was something not right about the relationship between PW3 and PW4. Concerning this remark, the learned appellate Judge observed its vagueness:

> Unfortunately the impact of the relationship was not explained i.e. whether the evidence became untruths or which parts cannot be believed as a result of such relationship.

Reading the judgment of the learned appellate Judge under the sub-heading, it is obvious that he considered it minor (and to which we respectfully agree) the discrepancy in the evidence of PW3 and PW4 relating to the supply of pager, and did not have any bearing on the case having regard to the charge and the circumstances as shown by the evidence. The charge, it must be remembered, is one of corruptly accepting money. There is the evidence of negotiation on the payment of $15,000 between PW3 and PW4. The crucial part of the case is what took place in the accused's chambers. In this regard there is evidence from PW4 handing over the marked money to the accused who was seen counting it, followed by the evidence of PW5 and PW6 seeing the accused holding and dropping the money on to the floor. Against the evidential scenario as outlined above, we see no matieriality in the supply or otherwise of pager. Nor, in our view, could any improper relationship between PW5 and PW6 be reasonably inferred on the conflicting and scanty evidence mentioned above. We see no merit in the contention.

Before leaving the issue, it is not impertinent to echo the following observation of Thomson CJ in *Khoon Chye Hin v. PP* [1961] 27 MLJ 105 at 107 in dealing with discrepancies and contradictions of witnesses:

> if a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong.

Finally, it was contended that the learned appellate Judge failed to consider the defence evidence at all. With respect, we are unable to agree. A perusal of the judgment of the appellate Court shows that the defence had indeed been considered. The degree or extent to which defence evidence needs to be examined would depend on the particular facts and circumstances of each case and the issues involved. In the instant case, once it was proved that the money $15,000 had been given to or received by the accused, the presumption under s. 14 of the Prevention of Corruption Act 1961 arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case, and it was for the accused to give an innocent explanation which the Court considered more likely than not that it was true, i.e. on a balance of probabilities, the test applied in civil proceedings. *PP v. Yuvaraj* [1969] 2 MLJ 89 PC.

The story of the accused is simple. He denied committing the offence. He denied having spoken to PW4 about PW2s case. He came to know of the money being on the floor in his chambers when PW4 pointed to the money in response to PW5's question: "where the money?" He denied holding the money when PW4 entered his chambers the 2nd time and when PW5 entered it. The accused did not expressly allege PW4 leaving the money in the chambers, but reading his evidence together with that of DW2 it appears obvious that the intention of the accused's defence, which is short and simple, was to create the impression that PW4 Ong planted the money in the accused's chambers without the knowledge of the accused, for DW2 said that PW4 had told him that he (PW4) had to put the money in the accused's chambers as he (PW4) was worried about his family. The explanation, however, has to be considered in the light of PW4 turning a prosecution witness after his arrest by the Anti-Corruption Agency. Under the law of our land, there is no presumption of PW4, even assuming he was an accomplice, being unworthy of credit by the mere reason of his delivering the money to the accused (See s. 18 of the Prevention of Corruption Act 1961). Furthermore on the accused's own evidence, he and PW4 had a cordial relationship while maintaining their respective positions. There is not even a suggestion, let alone evidence, that PW4 had maliciously wanted to harm the accused. On this last point, the learned appellate Judge, in our opinion, had properly addressed his mind when he said in his judgment (p. 40 of the Appeal Record):

> I have warned myself that corrupt money can easily be planted or that an innocent man can be quickly framed but from all the evidence gathered by the Sessions Court Judge this cannot be so in our case.

As to the consideration of the defence, the learned appellate Judge said: (pp. 38-40 of the Appeal Record)

> The evidence of the accused (the respondent here) and DW2, is, in my opinion, insufficient to rebut the element of the charge ...
>
> On all the evidence that the Sessions Court had, I am of the opinion the Court cannot fly in the face of the facts.
>
> ...
>
> Then once there was a finding that corrupt money was passed (or in this case handed) to the respondent, it was up to the respondent to rebut that the money was not corrupt money or show it was innocently given ... This was not satisfactorily explained.

Having regard to the above, we find totally unacceptable the contention that the learned appellate Judge had failed to consider the defence evidence at all. True, he had not related the evidence of the accused and that of DW2, but that is quite different from saying that the defence case was not at all considered. From the tenor of the judgment, we are convinced that he had.

Conclusion

On our part, we find the prosecution evidence weighty and convincing. This coupled with the absence of any reasonable explanation why PW4 and, for that matter, any of the other prosecution witnesses, should frame the accused, we are in agreement with the learned appellate Judge that, on the facts and the law applicable, the accused had failed to raise any reasonable doubt on the prosecution case.

We are fully aware of the established general principle that an appellate Court should be slow to substitute its own view of the facts for that of the trial Judge. However, after perusing the Appeal Record in this case, we are of the unanimous view that the learned appellate Judge had more than sufficient grounds and was right in reversing the order of acquittal and discharge of the accused and substituting therefor the order of conviction. Accordingly, we affirm the order of conviction.

On sentence, we are of the unanimous view that the imposition of the fine of RM5,000 in default 12 months' imprisonment in addition to the prison sentence of three years is wrong in principle since there is clear evidence that the

accused had not profited from his wrong doing; the three year imprisonment sentence is already sufficient punishment. In our view, a punitive fine should not be added to a term of imprisonment which a sentencer considers is itself adequate punishment for the offence except in rare cases where, for example, even the maximum permitted custodial sentence is considered to be inadequate. We, therefore set aside the fine of RM5,000 in default 12 months' imprisonment but confirm the sentence of three years' imprisonment.

Reported by WA Sharif